

Morrow



Comptroller General
of the United States

Washington, D.C. 20548

Decision

Matter of: Ward Construction Company
File: B-240064
Date: July 30, 1990

Stan Ward, for the protester.
Herbert F. Kelly, Jr., Esq., and Capt. Linda Armstrong,
Office of the Judge Advocate General, Department of the
Army, for the agency.
Charles W. Morrow, Esq., and James A. Spangenberg, Esq.,
Office of the General Counsel, GAO, participated in the
preparation of the decision.

DIGEST

Bid that omitted a separate price for a bid item that was
subject to a statutory cost limitation was properly rejected
as nonresponsive since this provision is a material term of
the solicitation.

DECISION

Ward Construction Company protests the rejection of its low
bid as nonresponsive under invitation for bids (IFB)
No. DADA03-90-B-0009, issued by the Directorate of
Contracting, Fitzsimons Army Medical Center (FAMC), for
renovation of the second floor east, building 500. Ward's
bid was rejected because it did not submit a separate bid
price for a line item that was subject to a statutory cost
limitation. Ward argues that this did not require
rejection of its bid.

We deny the protest.

On March 2, 1990, FAMC issued the IFB. Section B.1 of the
IFB called for separate prices for two line items and a
lump-sum total for the entire work.^{1/} This section further
advised that item No. 0001 was subject to a statutory cost

^{1/} These items were designated item 0001, alteration new
work; item 0002, repair work; and item 0003, alteration and
repair work.

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limitation of \$200,000.^{2/} The IFB further advised that a bid which did not contain separate bid prices for items subject to the statutory cost limitation "may be considered nonresponsive."

With regard to section B.1, on March 22 FAMC received a letter from Ward stating in part that: "[W]e find this section very confusing. Please redefine how we calculate and or quantify bid amounts 0001, 0002, and 0003." Although FAMC did not formally respond to Ward's inquiry, FAMC telephonically advised Ward to bid the job as directed by sections B and C of the IFB.^{3/}

Ward submitted the low bid of 10 bids received, with a lump-sum bid price of \$1,389,000. However, Ward failed to submit separate prices for item Nos. 0001 and 0002. For this reason, FAMC rejected Ward's bid as nonresponsive and made award to the next low responsive bidder.

Ward argues that its failure to bid a separate price for item No. 0001 did not require FAMC to reject its bid because the statutory cost limitation was not a material or essential requirement for evaluating bids. In this regard, Ward notes that the IFB did not indicate how individual prices were to be evaluated and that FAMC based its evaluation of bids on their lump-sum prices.

Federal Acquisition Regulation § 36.205 (FAC 84-45) provides that contracts for construction shall not be awarded at a cost in excess of the statutory cost limitations, unless these limitations are waived for the particular contract and that bids exceeding applicable statutory limitations "shall" be rejected unless an

^{2/} The particular statutory limitation in this case put a \$200,000 ceiling on the new construction portion of the contract work. The IFB stated that this limitation also included allowances to be added to the bid price for this item. These allowances were: (1) "contingencies," which was calculated as 10 percent of the bid price for this item, and (2) overhead, which was calculated as 5.5 percent of the sum of the bid price for this item and the contingencies.

^{3/} Section C.4 of the IFB stated that the statutory limitation of \$200,000 for bid item No. 0001 is defined as 25 percent of the heating, ventilation, and air conditioning (HVAC) costs.

exemption is granted. Thus, in the absence of a proper waiver, a bid exceeding the applicable cost limitation generally must be rejected. See Skip Kirchdorfer, Inc. and David Elder Constr. Co., Inc., B-204244, Nov. 24, 1981, 81-2 CPD ¶ 425.

In asserting that its bid should not be rejected, Ward primarily relies upon Wynn Constr. Co., B-220649, Feb. 21, 1986, 86-1 CPD ¶ 184, aff'd on recon., B-220649.2, Apr. 14, 1986, 86-1 CPD ¶ 360, where we permitted acceptance of a bid under mistake in bid procedures where some item prices exceeded the statutory cost limitation. In Wynn, the bidder had mistakenly underpriced one item that was not subject to the statutory cost limitation which resulted in the overpricing by the same dollar amount of an item that was subject to the cost limitation. We determined that the agency properly allowed the mistake in bid to be corrected to reallocate prices so as to comply with the statutory cost limitation because the lump-sum bid did not change, and the evidence offered by the bidder was clearly sufficient to allow correction of the bookkeeping error under mistake in bid procedures.

The circumstances of this case are distinguishable from Wynn. The protester's bid here did not exceed the statutory cost limitation as a result of a mistake. Rather, Ward indicates that it chose not to comply with the statutory cost limitation because it mistakenly believed that complying with the term was not essential or might subject it to penalties under 18 U.S.C. § 1001 (1988). As we explained in Bill Strong Enters., Inc., B-222492.2, Aug. 11, 1986, 86-2 CPD ¶ 173 (where bidder's request to correct its bid by reallocating its price so as to comply with the statutory cost limitation properly was denied), the approach in Wynn is applicable only to situations where the bidder offers clear and convincing evidence of mistaken price allocation. Ward's bid does not reflect a mistake in allocating its price, but reflects an improvident decision not to comply with the cost limitation provision. Under bid correction procedures, correction of a mistake in bid is not permitted where the alleged mistake is based on an incorrect premise which a bidder discovers after the opening of bids. See Oregon Elec. Constr., Inc., 68 Comp. Gen. 110 (1988), 88-2 CPD ¶ 512. To allow such a "correction" would impermissibly permit a bidder to recalculate its bid to

arrive at a bid never intended before bid opening. Id. Therefore, Ward's bid was not appropriate for correction under mistake in bid procedures, and properly was rejected as nonresponsive.

Ward also claims that the agency abused its discretion in not waiving the statutory cost limitation. However, when a bidder offers a bid price in excess of a statutory cost ceiling it takes the risk that its bid will be rejected as nonresponsive if no waiver of this limitation is requested or granted. Triax Pacific, Inc., B-236920, Jan. 23, 1990, 90-1 CPD ¶ 91. Since Ward did not offer in its bid to provide a price breakdown it is doubtful whether the agency should have requested a waiver under its procedures. See 48 Comp. Gen. 34, 38 (1968) (bidder's refusal to submit cost apportionment information satisfying the statutory limits should be regarded as a material discrepancy rendering the bid nonresponsive, since the government would have no way of determining whether projected costs will stay within statutory limits.)

Finally, we disagree with Ward's contention that FAMC is obligated to accept its interpretation of the cost limitation requirement because FAMC did not reasonably clarify the limitation when it sought clarification. Here, the IFB clearly stated that item No. 0001, which was subject to the statutory cost limitation, would be computed by taking 25 percent of the HVAC. Moreover, the IFB expressly advised bidders that the failure to insert prices for items subject to the statutory cost limitation may result in rejection of the bid.^{4/} Although Ward has argued that the IFB did not clearly define HVAC, this alleged deficiency was apparent prior to bid opening and was required to be protested prior to bid opening to be timely under our Bid Protest Regulations. See 4 C.F.R. § 21.2(a)(1) (1990).

The Board of Contract Appeals cases cited by the protester, see, e.g., Triple "A" South, ASBCA No. 26636, 86-2 BCA 18968 (1986), that indicate an agency's failure to respond to a contractor's request for clarification may subject it to the contractor's interpretation are not relevant here

^{4/} Although the IFB indicated the bid "may" be rejected as nonresponsive, we have held this precatory language is just as compelling and material as if more positive language were employed. See A.D. Roe, Co., Inc., 54 Comp. Gen. 271, 275 (1974), 74-2 CPD ¶ 194; Skip Kirchdorfer, Inc. and David Elder Constr. Co., Inc., B-204244, supra.

because they involve the resolution of disputed provisions of awarded contracts and do not apply to the interpretation of bids, particularly where a bidder does not follow the solicitation instructions.

Accordingly, the bid properly was rejected as nonresponsive and the protest is denied.



James F. Hinchman
General Counsel